United States Department of Labor
Employees' Compensation Appeals Board

J.E., Appellant	)	
	)	**Docket No. 07-674**
and	)	**Issued: July 5, 2007**
	)	
DEPARTMENT OF THE NAVY,	)	
CHARLESTON NAVAL SHIPYARD,	)	
Charleston, SC, Employer	)	
	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 16, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 15, 2006 denying his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly denied appellant's claim for a schedule award for hearing loss.

FACTUAL HISTORY

On August 23, 2006 appellant, then a 64-year-old machinist, filed a claim for compensation benefits alleging that he sustained permanent hearing loss while in the performance of duty. He retired on July 2, 1993.

Appellant and the employing establishment submitted employing establishment audiograms from October 13, 1960 to October 5, 1992.[1] The audiograms revealed progressive bilateral sensorineural hearing loss. The audiogram performed closest in time to appellant's July 1993 retirement was dated October 5, 1992. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed the following: right ear 5, 10, 25 and 50 decibels; left ear 5, 10, 15 and 50 decibels.

On August 23, 2006 appellant filed a claim for a schedule award.

The employing establishment submitted an undated report from Dr. Mark Hammett, a Board-certified otolaryngologist and employing establishment physician, who reviewed appellant's medical records but did not perform a physical examination of appellant. Dr. Hammett noted that appellant's initial audiogram performed in October 1960 revealed no significant hearing loss. He noted that subsequent audiograms revealed progressive hearing loss across the range of normal speech and in high frequency ranges. Dr. Hammett compared an entry audiogram dated October 13, 1960 and an exit audiogram dated October 5, 1992 which was the last audiogram performed within nine months of appellant's retirement in 1993. He opined that appellant's demonstrated bilateral hearing loss could be attributed to noise exposed to at the employing establishment; however, he determined that appellant's hearing loss was not ratable in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (5th ed. 2001) (A.M.A., *Guides*).

A statement of accepted facts dated September 13, 2006 noted that from September 1960 to 1964 appellant was a machinist apprentice, from 1964 to 1968 a machinist, from 1968 to 1974 a planner machinist and from 1974 to 1993, a planner estimator machinist. During these periods of time, he was exposed to noise from grinders and pneumatic tools. Appellant advised that since December 2002 he worked as a bridge crane installer and repairman and was exposed to noise from pneumatic tools and hammers. He advised that he was given earplugs in 1964.

By letter dated September 19, 2006, the Office referred appellant to Dr. Robert Marwick, a Board-certified otolaryngologist, for otologic examination and audiological evaluation. The Office provided Dr. Marwick with a statement of accepted facts, available exposure information and copies of all medical reports and audiograms.

Dr. Marwick performed an otologic evaluation of appellant on October 3, 2006 and audiometric testing was conducted on the doctor's behalf on the same date. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed the following: right ear 5, 20, 50 and 70 decibels; left ear 5, 20, 50 and 60 decibels. Dr. Marwick determined that appellant sustained moderate to profound bilateral sensorineural hearing loss related to or aggravated by hazardous employment noise exposure. He advised that appellant sustained hearing loss of 35.6 percent on the right and 18.8 percent on the left and a binaural hearing loss of 21.6 percent. Dr. Marwick noted that, when the October 13, 1960 baseline audiogram was compared to the exit audiogram dated October 5, 1992, a threshold shift was noted in both ears and the pure tone findings in 1992 exceeded the anticipated presbycusic curve of a 51 year old. He opined that

[1] These audiograms appear to have been performed as part of an employing establishment hearing conservation program.

based on the statement of facts the occupational noise level exposures were of sufficient intensity and duration to have caused the decrease in question. Dr. Marwick recommended binaural amplification.

In a decision dated October 10, 2006, the Office accepted appellant's claim for bilateral hearing loss due to work-related noise exposure.

On October 11, 2006 an Office medical adviser reviewed Dr. Marwick's report and compared the audiometric test of October 3, 2006 and an October 5, 1992 employing establishment audiogram. The medical adviser based appellant's schedule award on the audiogram dated October 5, 1992 as this audiogram most approximated the hearing loss at the time of retirement as it was performed nine months prior to his retirement. The medical adviser noted that noise-induced hearing loss did not progress after removal from the source of the noise and therefore the hearing loss that occurred after he was removed from the noise in 1993 was not the result of noise-induced hearing loss causally related to his employment duties. The medical adviser concluded that, in accordance with the fifth edition of A.M.A., *Guides*, appellant sustained a zero percent bilateral sensorineural hearing loss. The medical adviser recommended that hearing aids not be authorized.

On November 7, 2006 the Office requested that the medical adviser provide additional rationale for his schedule award and recalculate his findings if appropriate.

On November 9, 2006 the medical adviser noted that the October 5, 1992 audiogram met the criteria for a valid audiogram as it was seen by an audiologist and signed by a physician. He referenced an attached summation regarding the failure of noise-induced hearing loss to progress after the removal from the noise exposure. The attached summation noted that scientifically noise-induced hearing loss was not considered to be progressive in nature as there are no documented studies in the literature supporting progressive deafness due to noise and the observed pattern of response to noise exposure was a loss followed by a partial or total improvement upon removal from the noise.

By decision dated November 15, 2006, the Office determined that the hearing loss was employment related but not severe enough to be considered ratable for purposes of a schedule award. The Office also found that appellant was not entitled to hearing aids.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[4]

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[5] Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.[6] Then, the "fence" of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.[7] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[8] The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.[9] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[10]

ANALYSIS

In the present case, the Office medical consultant did not calculate appellant's schedule award based on the audiogram dated October 3, 2006, which was performed on behalf of Dr. Marwick. Rather, the Office medical consultant selected an earlier audiogram dated October 5, 1992 taken by the employing establishment nine months prior to appellant's retirement.

Although the Office medical adviser may review any audiogram of record[11] in determining which one most accurately reflects appellant's employment-related hearing loss, the Office should not arbitrarily select one audiogram without explanation.[12] The Board precedent contemplates that the Office will give rationale for selecting one audiogram over another or, in the alternative, it may have another evaluation made of appellant's hearing in order to resolve the inconsistency.[13]

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[4] *Id.*

[5] A.M.A., *Guides* at 250 (5th ed. 2001).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Donald E. Stockstad,* 53 ECAB 301 (2002), *petition for recon. granted* (*modifying prior decision*), Docket No. 01-1570 (issued August 13, 2002).

[11] Federal (FECA) Procedural Manual, Part 3 -- Medical, *Requirement for Medical Reports,* Chapter 3.600.8(a)(2) (September 1995).

[12] *See Joshua A. Holmes,* 42 ECAB 231 (1990).

[13] *See John C. Messick,* 25 ECAB 333 (1974).

The Office procedures also contemplate that, while noise-induced hearing loss does not typically progress after exposure to noise ceases, an Office medical adviser or consultant will provide a well-rationalized opinion for selecting one audiogram over another.[14] In this case, the medical adviser indicated that he selected the October 5, 1992 audiogram, taken nine months prior to appellant's retirement, because "NIHL [noise-induced hearing loss] does not progress after removal from source of noise." In an addendum, he noted that "[t]he October 5, 1992 EA audiogram meets our criteria for a valid audiogram. See attached summation re[garding] failure of NIHL to progress after removal from the noise exposure." However, the doctor did not provide any additional medical rationale other than this conclusory statement to explain why such a shift in hearing loss would not be caused or aggravated by appellant's employment even after one is removed from the noise.[15] Additionally, the Office medical adviser failed to address why he selected the October 5, 1992 audiogram over the October 3, 2006 audiogram taken on behalf of Dr. Marwick, the Office's referral physician, in light of the fact that appellant's employment and noise exposure continued for an additional nine months after the October 5, 1992 audiogram. This is especially important because this additional exposure may have caused additional hearing loss which was not accounted for in the October 5, 1992 audiogram. Likewise, the medical adviser did not elaborate on why he did not recommend that hearing aids be authorized, particularly in light of Dr. Marwick's opinion that appellant have binaural amplification.

Therefore, the medical evidence is insufficiently developed with regard to which audiogram most accurately reflects appellant's employment-related hearing loss.

Proceedings under the Act are not adversary in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[16] Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[17]

Consequently, the case must be remanded for the Office to obtain a supplemental report from the Office medical adviser which provides a detailed reasoned medical opinion explaining why such a shift in appellant's hearing loss would not be caused or aggravated by appellant's employment even after he was removed from the noise, why he selected the October 5, 1992 audiogram as the record reveals that appellant had additional exposure to noise for

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[14] *See id.*

[15] *Stuart M. Cole,* 46 ECAB 1011 (1995) (where medical consultant should provide a rationalized opinion as to why such a shift in hearing loss would not be caused or aggravated by appellant's employment even after one is removed from the noise); *Jimmie H. Duckett,* 52 ECAB 332 (2001); *Franklin D. Haislah,* 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[16] *John W. Butler,* 39 ECAB 852 (1988).

[17] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports,* Chapter 3.600.4 (October 1990).

approximately nine months thereafter prior to retiring in July 1993 and why he did not recommend hearing aids. Following this and such other development as deemed necessary, the Office shall issue a *de novo* decision.[18]

CONCLUSION

The Board finds this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the November 15, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: July 5, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[18] *Robert F. Hart,* 36 ECAB 186 (1984).